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No. 84-2008

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

READING COMPANY
AND
CENTRAL JERSEY INDUSTRIES, INC.,

Petitioners,

—v.—

JOSEPHINE SCHWEITZER, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MOTION OF THE PENN CENTRAL CORPORATION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE AND BRIEF IN SUPPORT OF THE PETITION OF READING COMPANY AND CENTRAL JERSEY INDUSTRIES, INC. FOR A WRIT OF CERTIORARI

Robert J. Siverd*
David A. Bernat*

Attorneys for Amicus Curiae
The Penn Central Corporation
500 West Putnam Avenue
Greenwich, Connecticut 06836
(203) 629-5314

*Counsel of Record

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MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE

The Penn Central Corporation ("PCC"), by its attorneys, respectfully moves the Court for leave to file the accompanying brief as *amicus curiae* in support of the joint petition of Reading Company and Central Jersey Industries, Inc. ("Petitioners") for a writ of certiorari to review the judgment of the Court of Appeals for the Third Circuit in *Schweitzer v. Consolidated Rail Corp.*, 758 F.2d 936 (3d Cir. 1985) ("*Schweitzer*"). PCC files this motion because counsel for Respondents Josephine Schweitzer, *et al.* and Consolidated Rail Corporation have refused to consent to the filing of a brief by PCC. For the reasons set forth below, we respectfully urge the Court to grant PCC's motion.

The petition presents fundamental and important issues concerning the power of Federal Bankruptcy Courts to treat and discharge the injury claims of persons based on exposure to asbestos (and other similar substances) prior to consummation of a reorganization under Section 77 of the Bankruptcy Act, former 11 U.S.C. § 205 (repealed), but not manifesting themselves until after consummation. The judgment in the *Schweitzer* case, which Petitioners seek to review in this Court, reversed decisions by two district courts, in the U.S. District Court for the Eastern District of Pennsylvania and in the U.S. District Court for the District of New Jersey, which held that personal injury claims asserted after the consummations of the Section 77 reorganizations of Reading Company ("Reading") and The Central Railroad Company of New Jersey, premised on exposure to asbestos on the part of former railroad employees, were discharged in their respective reorganizations. The Third Circuit's determination in *Schweitzer*, in our view, conflicts with established precedent concerning the scope of dischargeable claims in, and the clear statutory purposes of, reorganization under Section 77. The Court of Appeals' decision also has implications for reorganizations under the Bankruptcy Reform Act of 1978, 11 U.S.C. § 101, *et seq*. If the decision below is accepted, judicial power to deal with tort claims based on alleged injury-causing exposure to asbestos prior to consummation will be unnecessarily restricted and the ability of the courts to fashion final reorganization plans upon which creditors and debtors may rely may be substantially impaired.

The decision of the Court of Appeals in *Schweitzer* arose against the backdrop of the massive reorganization of the former Penn Central Transportation Company ("PCTC") and other Northeastern rail carriers. The eight-year PCTC reorganization under Section 77 of the Bankruptcy Act, from which PCC emerged in 1978, was an extraordinarily complex proceeding which resulted in a plan of reorganization that served as a model for others, including Petitioners. The reorganization was not only monumental in its complexities, but unusual because of the intervention of federal remedial legislation. In

early 1974, the Regional Rail Reorganization Act of 1973 ("Rail Act"), which amended Section 77 particularly with respect to the role of the Interstate Commerce Commission, became effective. Pursuant to the Rail Act, effective April 1, 1976, virtually the entire PCTC rail system, including rolling stock, employees, and books and records, was conveyed to a new entity, Consolidated Rail Corporation, and the remaining retained assets were either liquidated or included as part of a plan of reorganization. Thereafter, in 1977, the many thousands of creditors who participated in the PCTC reorganization proceedings voted for a final reorganization plan, which was also reviewed and approved by the federal courts. *In re Penn Central Transp. Co.*, 458 F.Supp. 1234 (E.D.Pa. 1978), *aff'd in part, remanded in part*, 596 F.2d 1107 (3d Cir. 1979). Notwithstanding the implementation of the Consummation Order and Final Decree in the PCTC reorganization on October 24, 1978, when PCTC received a general discharge of claims, PCC has been named as a defendant in by far the largest number of asbestos-related personal injury claims brought by ex-railroad employees. It is currently defending more than 250 such civil actions, which are pending in various state and federal courts. It is expected that many more such actions are likely to be filed in the future.

PCC submits that the deleterious impact of the decision below is best understood in light of the harm it works to the complex and intricate creditor compromises necessarily made to achieve the final PCTC plan. In its eight-year reorganization, creditors, PCTC as debtor and the various secondary debtors made a host of critical compromises of debts, claims and obligations involving billions of dollars to arrive at an acceptable final plan which covered the claims and interests of all creditors—including a vast number of personal injury claimants. The PCTC plan and the compromises on which it was built were the basis for the entry by the PCTC reorganization court of the Consummation Order discharging PCTC. The decision below, however, effectively undercuts those compromises by permitting the assertion, years after consumma-

tion, of multimillion dollar tort claims which creditors had no reasonable expectation would be lodged against the reorganized company. Because PCTC's reorganization was clearly the most involved of those of the Northeast carriers and because PCTC is a party to the largest number of pending actions affected by the *Schweitzer* decision, PCC believes that its position in this respect is very different from that of other parties hereto, and is perhaps unique. We respectfully ask the Court to grant PCC's motion so that it may benefit from PCC's valuable perspective in this case.

Respectfully submitted,

/s/ ROBERT J. SIVERD
Robert J. Siverd
David A. Bernat
Attorneys for Amicus Curiae
The Penn Central Corporation
500 West Putnam Avenue
Greenwich, Connecticut 06836
Telephone: (203) 629-5314

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QUESTIONS PRESENTED

1. Whether a reorganization court has the power to deal with and provide for latent future asbestos-related toxic claims as part of a reorganization of a debtor corporation under Section 77 of the Bankruptcy Act?

2. Whether, assuming that a reorganization court has such authority, the court may bar such future claims, where the rail operations out of which such claims arose are, during the course of the reorganization, transferred to a solvent successor railroad?

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BRIEF OF THE PENN CENTRAL CORPORATION AS AMICUS CURIAE IN SUPPORT OF THE PETITION

INTEREST OF THE AMICUS CURIAE

The Penn Central Corporation ("PCC") submits this brief, as *amicus curiae*, in support of the petition of Reading Company ("Reading") and Central Jersey Industries, Inc. ("CJI") for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit entered on March 29, 1985 (the "Petition").

PCC is the corporate entity which emerged from the much publicized reorganization of Penn Central Transportation Company ("PCTC") on October 24, 1978, under Section 77 of the Bankruptcy Act of 1898 (the "Bankruptcy Act"), formerly codified at 11 U.S.C. § 205. PCTC's economic demise, which

began after World War II, was basically caused by the railroad's inability to control the costs of freight and passenger service and to secure adequate revenues for those services. By June of 1970, losses from the railroad functions had mounted to about $1 million per day and PCTC was unable to meet its debts as they became due. So, on June 21, 1970, PCTC petitioned the United States District Court for the Eastern District of Pennsylvania to begin a process of reorganization that would not only effect the largest and most complex reorganization under Section 77, but also serve as a model for the reorganization of the other former bankrupt Northeast railroads, including the Petitioners. PCTC's petition was thereafter granted and reorganization proceedings were held under the supervision of District Court Judge John P. Fullam, until Order No. 3708, the Consummation Order and Final Decree dated August 17, 1978, became effective on October 24, 1978 and formally consummated the Plan of Reorganization. *See*, *In re Penn Central Transp. Co.*, 458 F.Supp. 1234 (E.D.Pa. 1978), *affirmed in part, remanded in part*, 596 F.2d 1102, 1127, 1154, 1155 (3d Cir. 1979), *cert. denied*, 444 U.S. 834, 835 (1979).

As was the case with the railroad predecessors of Reading and CJI, congressional legislation in the 1970's played a prominent and rather unique role in the PCTC reorganization by providing for the divestiture by PCTC of its rail assets and rail-related functions and for their transfer to Consolidated Rail Corporation ("Conrail") on April 1, 1976. Under the Regional Rail Reorganization Act of 1973, 45 U.S.C. §§ 701-93 ("Rail Act") and the Final System Plan promulgated by the United States Railway Association pursuant thereto, the Reorganization Trustees for PCTC, effective April 1, 1976, ceased all rail operations and conveyed to Conrail and other railroads virtually the entire railroad organization, including all railroad employees, track, rolling stock, records, plant and equipment. After conveyance of the PCTC railroad organization to Conrail, the Reorganization Trustees for PCTC submitted an amended Plan of Reorganization to the PCTC Reorganization

Court. The Plan provided for the treatment of the many thousands of claims and interests of PCTC's creditors, claimants and stockholders and for the establishment of a viable reorganized company, free of the entangling financial obligations arising out of PCTC's then-defunct railroad business, including a great number of personal injury tort claims. The Plan, which was formulated only by reason of the willingness of such creditors and the debtor to compromise claims, debts and obligations involving billions of dollars, received a favorable vote of PCTC's creditors, and was approved by the Reorganization Court and the United States Court of Appeals for the Third Circuit. *See, In re Penn Central Transp. Co.*, 458 F.Supp. 1234 (E.D.Pa. 1978), *aff'd in part, remanded in part*, 596 F.2d 1102 (3d Cir. 1979). Since the consummation of the PCTC reorganization on October 24, 1978, when PCTC received a general discharge of claims and was authorized to issue new securities, PCC has not engaged in any railroad activities. PCC currently manufactures products and supplies services through subsidiaries, primarily in the areas of energy and natural resources, and electronics, defense and telecommunications.

PCC has a direct and immediate interest in the issues raised by the Petition. In its reorganization, PCTC used comprehensive and orderly procedures to quantify claims and interests of all kinds. The final PCTC Plan fairly provided for all such interests, including personal injury claims which, under the Plan, were paid in cash. As of March 1978, personal injury claims totalled $173 million, of which $8.2 million had already been satisfied. Since 1981, however, PCC and its wholly-owned subsidiaries have been named as defendants in some 250 actions filed nationwide by plaintiffs or representatives of plaintiffs, who were employees of PCTC or its wholly-owned subsidiaries prior to April 1, 1976. And more such actions are expected to be filed. These plaintiffs seek to recover damages for injuries allegedly related to asbestos exposure during their railroad employment. Their claims, which are premised upon, *inter alia*, the Federal Employer's Liability Act, 45 U.S.C.

§ 51, *et seq.* ("FELA"), and the Boiler Inspection Act, 45 U.S.C. § 22, *et seq.*, are generally similar to those now pending against Reading and CJI. These 250 actions constitute the vast majority of all asbestos-related occupational disease actions brought by ex-railroad employees against the reorganized Northeast railroad carriers.

The decision of the Court of Appeals below thus has a demonstrable adverse impact on PCC in the more than 250 cases in which it is a party. At the same time, the decision below effectively undermines the premises of PCTC's consummated reorganization carried out in conformity with the statutory provisions and congressional policies reflected in Section 77. Further, it may substantially impede the ability of the federal courts now and in the future to implement final and equitable plans of reorganization with respect to claims of persons asserting injuries based on exposure to asbestos and other allegedly toxic substances.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 758 F.2d 936 and is reproduced in the Appendix to the Petition (Pet. App. at 1a-18a). The opinion of the district court in the Reading cases is reported at 36 Bankr. 469 and is reproduced in the Appendix to the Petition (Pet. App. at 19a-26a). The opinion of the district court in the CJI cases is reported at 38 Bankr. 686 and is reproduced in the Appendix to the Petition (Pet. App. at 38a-44a).

JURISDICTION

The judgment of the Court of Appeals was entered on March 29, 1985 and is reproduced in the Appendix to the Petition (Pet. App. at 53a-59a). A petition for rehearing in the CJI cases was denied on April 26, 1985 (Pet. App. at 60a-61a). Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES AND RULES INVOLVED

The statutes involved in this case are Sections 77(b)(3) and 77(f) of the Bankruptcy Act, former Sections 11 U.S.C. §§ 205(b)(3) and 205(f), and Sections 101(4) and 1109(b) of the Bankruptcy Reform Act of 1978, 11 U.S.C. § 101, *et seq.* (1982) (the "Code"), relevant portions of which are reproduced in the Appendix to this brief.

STATEMENT OF THE CASE

Reading and The Central Railroad Company of New Jersey (subsequently reorganized as CJI) were common carriers by railroad and two of the major railroads in the Northeast that sought relief under the bankruptcy laws in the late 1960's and early 1970's. Reading filed a petition for reorganization under Section 77 of the Bankruptcy Act on November 23, 1971; The Central Railroad Company of New Jersey ("CNJ") filed its petition on March 22, 1967. While Petitioners were in the process of reorganization, Congress enacted the Rail Act to preserve a Northeastern rail transport system in the wake of the grave financial crisis brought about by the bankruptcies of the major railroads in the region, including PCTC. The Rail Act amended various provisions of Section 77, particularly those relating to the role of the Interstate Commerce Commission, and provided for a transfer of essential rail assets of those carriers to a new entity, Conrail, which was formed in 1974. The Rail Act also provided for the liquidation or reorganization of the remaining assets of the Northeast railroads, which, because of their economic plight, were unable to effect reorganizations as railroads on an income basis under Section 77 of the Bankruptcy Act.

The Rail Act procedure required a court determination that the debtor railroad was incapable of an income-based reorganization, and after that determination, a divestiture by the debtor of all rail-related property and interests and the convey-

ance of those properties and interests to Conrail. After conveyance of all of the specified rail properties and interests to Conrail, the debtor railroad either liquidated its remaining assets or adopted a plan of statutory reorganization to benefit creditors and to enable the reorganized company to achieve the statutory goal of a fresh start.

Judge J. William Ditter, Jr. of the U.S. District Court for the Eastern District of Pennsylvania presided over Reading's reorganization. After the Rail Act became effective, Judge Ditter made the appropriate analysis of the propects for an income-based reorganization and determined that Reading could not successfully be reorganized as a railroad. Consequently, under the Rail Act, Reading conveyed all of its rail properties and interests to Conrail effective April 1, 1976, and on that date ceased to be an operating railroad. The properties and interests so conveyed included the real estate comprising the Reading rail system, all designated rail assets, track and other track materials, books and records, including employee records, furniture, supplies and equipment, and all cash and other current assets. As required by the Rail Act, Conrail offered employment to all former active Reading employees. The only assets retained by Reading after conveyance to Conrail were certain non-rail properties, a trucking company, some marine equipment, other investments, a claim against Conrail and the United States for the value of the assets that were transferred, and its federal income tax net operating loss carry-forwards.

Thereafter, the Reading Trustees prepared and submitted a plan of reorganization with respect to Reading's remaining assets (the "Plan"). The final version of the Plan was presented to Judge Ditter by the Trustees on June 25, 1979. The Plan was fashioned after the plan approved in the PCTC reorganization proceedings and was structured to preserve one of Reading's principal assets, the federal income tax loss carry-forwards.

Reading's Plan was approved by Judge Ditter on May 21, 1980 and confirmed on September 25, 1980, after a vote of Reading's creditors. Pursuant to Order No. 2004 of the Read-

ing Reorganization Court (the "Reading Consummation Order"), the Plan was consummated on January 1, 1981. In accordance with the Reading Consummation Order, the books and accounts of the former Reading Company were closed at 11:59 p.m. E.S.T. on December 31, 1980, and the books and accounts of the reorganized Reading Company were opened at 12:00 a.m., E.S.T. on January 1, 1981. That order also provided that the assets of the former Reading Company were transferred to the reorganized Reading free and clear of any and all claims of the former Reading Company, its creditors, claimants and stockholders. The Reading Consummation Order further provided that the former Reading Company and its Trustees were discharged and released forever from any and all claims.

Chief Judge Clarkson F. Fisher of the U.S. District Court for the District of New Jersey presided over CNJ's reorganization. Like Reading, CNJ conveyed all of its rail properties and interests to Conrail under the Rail Act, effective April 1, 1976, and on that date ceased to be an operating railroad. Thereafter, the CNJ Trustee prepared and submitted a plan of reorganization with respect to CNJ's remaining assets (the "CNJ Plan") and pursuant to Order No. 965 filed on September 13, 1979, the CNJ reorganization was consummated on September 14, 1979. In accordance with Order No. 965, the CNJ Consummation Order, the assets of the former CNJ were transferred to the reorganized company, CJI, free and clear of any and all claims of the former CNJ, its creditors, claimants and stockholders. Further, the CNJ Consummation Order provided that the former CNJ and its Trustee were discharged and released forever from any and all claims.

After consummation of the Reading and CNJ Plans, several former Reading and CNJ railroad employees and representatives and survivors of former Reading and CNJ railroad employees commenced personal injury actions against Conrail, CJI and Reading asserting claims under the FELA and related statutes. The plaintiffs in those actions seek to recover for injuries allegedly related to the railroad employees' exposure to

asbestos, which became manifest after the transfer of the rail assets by Reading and CNJ to Conrail and after the effective dates of the Reading and CNJ consummation orders.

Reading moved to dismiss each of the cases against it on the ground that the plaintiffs are barred by its Consummation Order or otherwise from asserting their claims against the reorganized Reading. Plaintiffs and Conrail opposed Reading's motions. The various FELA and related actions were then transferred to District Judge Ditter for purposes of deciding the several motions to dismiss. In an opinion and order dated January 10, 1984, Judge Ditter granted Reading's motions, ruling that the plaintiffs' claims were discharged in the reorganization proceedings, and transferred the cases back to the various judges to whom they had been assigned originally (Pet. App. at 19a-26a). Those judges determined that Judge Ditter's order was a final decision as to Reading's rights and liabilities and that there was no just reason to delay entering judgment in Reading's favor, and accordingly entered final judgments under Federal Rule of Civil Procedure 54(b).

CJI was also sued under FELA and related statutes following its reorganization by a number of former CNJ employees and obtained an injunction against the prosecution of such suits from its reorganization court on the ground that the claims were barred by its Consummation Order and had been discharged in the reorganization proceedings (Pet. App. at 38a).

The Reading and CJI plaintiffs and Conrail perfected appeals to the United States Court of Appeals for the Third Circuit, which were consolidated. The Court of Appeals, in a decision of apparent first impression, reversed the judgments of the district courts and remanded the various cases for further proceedings. The court held as a matter of federal law that "F.E.L.A. actions for asbestos-related injury do not exist before manifestation of injury." (Pet. App. at 14a).

Based on the conclusion that the plaintiffs' causes of action did not exist until after the date on which the debtors' Section

77 reorganizations were consummated, the Court of Appeals ruled that the Reading and CNJ reorganization courts could not discharge plaintiffs' claims because they were not "claims" as defined by Section 77. The court below rejected the argument that the expansive language of Section 77(b)(3), which provides that "claims" include "interests of whatever character," encompasses a creditor's contingent asbestos-related FELA claim under the Bankruptcy Act, when the claimant has no technical present cause of action against the debtor. The court also determined that plaintiffs, who were long-time railroad employees during the period of their alleged workplace exposure to asbestos and subject to the protection of FELA, had no sufficient legal relationship with their employers on which such a statutory Section 77(b) "interest" may be premised.

On June 16, 1985, Circuit Judge Robert B. Krupansky, who presided over the reorganization of Erie Lackawanna before his elevation to the U.S. Court of Appeals for the Sixth Circuit and who continues to do so, issued an order expressly declining to follow the decision of the court below. Circuit Judge Krupansky held that "the discharge [of Erie Lackawanna] under Section 77 of the Bankruptcy Act is an absolute bar to the post confirmation [FELA and other] claims asserted herein." (Pet. App. at 87a-88a).

SUMMARY OF ARGUMENT

The Third Circuit has adopted an overly restrictive rule that the personal injury damage claims of former railroad employees based on exposure to asbestos prior to consummation of a reorganization under Section 77 of the Bankruptcy Act cannot be discharged in such proceedings because the employees lacked a technical cause of action during reorganization. Decisions of this Court and the lower courts have established that bankruptcy reorganizations under Section 77 are designed to maximize the value of the estate for the benefit of creditors

and to foster and promote the adoption of reorganization plans that deal with creditor claims with equity and finality. *See, Commodity Futures Trading Comm'n v. Weintraub*, ____ U.S. ____, 105 S.Ct. 1986, 1993 (1985); *Duryee v. Erie Railroad Company*, 175 F.2d 58, 63 (6th Cir.), *cert. denied*, 378 U.S. 861 (1949); *Van Schaick v. McCarthy*, 116 F.2d 987, 992 (10th Cir. 1941). To this end, Congress incorporated into Section 77 a broad and expansive definition of dischargeable claims to include contingent claims and other interests of whatever character. *Gardner v. New Jersey*, 329 U.S. 565, 573 (1947); 5 Collier on Bankruptcy § 77.20 at 602-03 (14th ed. 1978). The decision below is at war with these purposes of reorganization and with the broad interpretation of the meaning of dischargeable claims that Congress plainly intended under Section 77. Further, the decision below is in direct conflict with well-reasoned precedent within the Sixth Circuit, which holds that tort claims of former railroad employees allegedly injured by exposure to asbestos before the consummation of the Erie Lackawanna reorganization are "claims" within the meaning of Section 77(b) and may be finally discharged precisely because of the sweeping meaning of the term "claims" under Section 77 and because a broad general discharge is necessary to effectuate Section 77's congressional purposes. *In re Erie Lackawanna Railway Co.*, No. B 72-2838 (N.D. Ohio June 18, 1985) (Pet. App. at 68a-69a, 72a-79a).

The unreasonable rule of the Third Circuit also does violence to the now consummated reorganizations of PCTC and other Northeast railroads. Those reorganizations were achieved through a complex and intricate process requiring critical compromises of debts, claims and obligations involving billions of dollars by creditors of the bankrupt railroads; without them, they could not successfully have been completed. Those creditor compromises, particularly in the case of the PCTC reorganization, were grounded on the assumption that a reorganization plan approved by creditors and the court would be final, and that the reorganized company would not be saddled with tort claims of the kind asserted by plaintiffs

below, seeking tens of millions of dollars in damages, that would undercut the utility of pre-plan compromises and erode the value of securities and other consideration transferred when the reorganizations were consummated.

Similarly, the restrictive approach the Court of Appeals has taken with respect to the bankruptcy power of the federal courts threatens to impede the ability of reorganization courts to confirm final reorganization plans upon which creditors, debtors and the reorganized entities alike may reasonably rely. Without power to dispose of and discharge the broadest range of claims authorized by Congress under Section 77, current and future efforts to reorganize failing concerns under the Code likely will be severely frustrated, and the ordinary difficulties encountered in the reorganization process will be compounded by uncertainties as a result of the decision below. In such circumstances, debtors and the federal courts may be impelled to resort to liquidation, rather than reorganization, in which estate values will not be maximized for the benefit of all creditors as intended by Congress. Accordingly, the unsound rule of the Third Circuit should be overturned.

REASONS FOR GRANTING THE WRIT

I

THE COURT OF APPEALS' DECISION IS IN CONFLICT WITH THE CONGRESSIONAL AIMS OF SECTION 77 REORGANIZATION AND UNDERMINES ESSENTIAL COMPROMISES WHICH WERE NECESSARILY MADE TO ACHIEVE VIABLE PLANS TO REORGANIZE THE NORTHEAST RAILROADS.

The reorganization of PCTC, Reading, CNJ and other Northeast rail carriers in little more than a decade was a major accomplishment achieved through a dynamic process guided by the statutory framework created by Congress in the Bankruptcy Act and the Rail Act. The success or failure of this

process, in turn, depended upon the ability of creditors and debtors, with the aid of federal courts, to arrive at crucial and intricate compromises of a multitude of debts, claims and obligations involving billions of dollars. The Court of Appeals' opinion, however, in an instant, undercuts the utility of those many compromises that were founded on the legitimate and reasonable expectations that the railroads' pre-consummation claims would be finally discharged and the reorganized entities would begin their existences with an asset base unencumbered by the spectre of future multimillion dollar tort claims.

Reorganizations under Section 77 seek to effectuate the bankruptcy goal of "maximizing the value of the estate" for the benefit of creditors. *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 584 (1935). As one of their main purposes, they aim to rehabilitate "the debtor by a readjustment of its financial structure in the interest of the debtor and its creditors and security holders, under a fair and equitable plan of reorganization which shall so modify or alter the rights of both secured and unsecured creditors that the fixed charges shall be brought within the probable future earnings available for the payment thereof." *Van Schaick v. McCarthy*, 116 F.2d 987, 992 (10th Cir. 1941). *Accord*, *Connecticut Ry. and Lighting Co. v. Palmer*, 305 U.S. 493, 501 (1939). To this end, Congress gave to Section 77 reorganization courts power to affect and dispose of claims of creditors which this Court has described as "sweeping" and "all-inclusive." *Gardner v. New Jersey*, 329 U.S. 565, 573, 575-76 (1947). Further, as in all such reorganizations, debtors, creditors and the courts work toward approval of a final plan, a key part of which involves "the discharge of all demands of whatever sort, executory and contingent, presently due or to mature in the future." *City Bank Farmers Trust Co. v. Irving Trust Co.*, 299 U.S. 433, 438-39 (1937).

Achieving those congressional purposes, however, required creditors and the debtors to reach essential compromises with respect to defined classes of claims and a great variety of thorny issues before plans could be approved and confirmed.

The PCTC Reorganization Court initiated this process in 1970 by directing the establishment of comprehensive and fair procedures designed to delimit a universe of claims. By Order No. 164 entered on February 17, 1971, the PCTC Reorganization Court established its Proofs of Claim program and generally required claimants with pre-petition claims to file formal written claims on or before June 1, 1971. Pursuant to that order, the PCTC Trustees notified more than 45,000 potential creditors, virtually all of which filed timely claims which were liquidated in the Proofs of Claim Program. Later, in Order No. 914 entered on September 12, 1972, the PCTC Reorganization Court adopted a procedure to accommodate the filing of tens of thousands of late claims. A similar process was utilized to identify and quantify the myriad claims of persons and entities having post-petition, secured and other types of claims against PCTC.

In 1977, a comprehensive reorganization plan was presented to creditors with due notice and was approved by the Reorganization Court. Overall, the Plan equitably provided for literally thousands of claims falling into fifteen different classes, the total value of which exceeded $3 billion. Late claims filed during the reorganization were also accounted for in the process.[1]

As a result, the approved PCTC Plan was expressly designed to cover all possible claims and interests which had been or might be asserted against the debtor or the Trustees and to dispose of them in accordance with the provisions of the Plan with finality. Section 3.3 of the Plan, for example, specifically

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1 Under Section 10.3 of the PCTC Plan, the reorganized company had to estimate, as of the consummation date (October 24, 1978) the value of unliquidated claims and to reserve securities to satisfy those claims when they were liquidated. The prospect that claims such as those of the approximately 250 FELA occupational disease plaintiffs—for possibly tens of millions of dollars in the aggregate—would be first asserted years after consummation against the reorganized entity in prejudice to the interests of claimants and creditors whose timely asserted claims are concededly within the ambit of the Plan, was *not* before creditors who voted on the Plan.

stated that "[a]ll obligations incurred by the Trustees and all obligations of and claims against Debtor that are outstanding as of the Consummation Date and not otherwise provided for in this Plan, will, unless the Court directs otherwise, be discharged." Section 11.1 of the Plan in similar fashion called for the broadest disposition of possible claims and interests by its provision that "[t]he property dealt with by the Plan, when vested in the Reorganized Company. . . will be free and clear of all claims of the Debtor, its creditors and Stockholder and all other persons, unless specifically provided in the Plan, and the Debtor will be discharged from its debts and liabilities."[2] Such provisions reflected the justifiable belief on the part of creditors and the debtors that plans made pursuant to Section 77's dictates were final and that value received in the form of securities and other consideration could not be diminished or lost as a result of later asserted claims which had an essential relation or nexus with the debtor's pre-consummation rail operations. *See, Duryee v. Erie Railroad Company*, 175 F.2d 58, 63 (6th Cir. 1949), *cert. denied*, 338 U.S. 861 (1949).

None of these beneficial plan provisions in the PCTC (or Reading or CNJ) Plans, however, could have been adopted or implemented without essential creditor compromises. As the Third Circuit pointed out in *In re Penn Central Transp. Co.*, 596 F.2d 1127, 1129 (3d Cir. 1979), the PCTC reorganization culminated in a "monumental plan designed to resolve the most complex set of interrelated and conflicting claims ever addressed under Section 77 of the Bankruptcy Act, 11 U.S.C. § 205." The nature of the compromises which were necessary to arrive at a final PCTC Plan were likewise monumental because of the existence of a wide range of issues that remained

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2 This is, of course, precisely the result intended by Section 77(f), formerly 11 U.S.C. § 205(f), which provided that:

> "The property dealt with by the plan, when transferred and conveyed to the debtor or to the other corporation or corporations provided for by the plan, or when retained by the debtor pursuant to the plan, shall be free and clear of all claims of the debtor, its stockholders and creditors, and the debtor shall be discharged from its debts and liabilities."

to be litigated. They included, for example, disputes over the priority of governmental claims, state, local and federal; the validity of a pledge agreement involving a major PCTC subsidiary; a broad range of issues relating to the coverages of mortgages; and difficult questions concerning the intricate relationships between PCTC and a number of companies which were secondary debtors in its reorganization. *See, In re Penn Central Transp. Co.*, 458 F.Supp. at 1263.

Fortunately, important and critical compromises on these issues were reached so that the PCTC reorganization could be concluded. As Judge Fullam explained at the time the PCTC Plan was approved:

> "The Plan now before the Court incorporates a host of compromises of various kinds. They include actual compromise settlement agreements; provisions of the Plan which carry out what the Trustees regard as a fair and reasonable adjustment of unresolved disputes; and underlying assumptions, concerning such matters as the Valuation Case, based upon judgements which have been arrived at through a process closely akin to compromise. The agreed-upon or proposed compromise settlements include disputes between the Trustees and particular claimants or classes of claimants regarding the amount or nature of the claims, and disputes between classes of creditors."
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> "While each compromise settlement, compromise proposal and compromise-type assumption must be evaluated individually, the importance of viewing the Plan as a cohesive unit cannot be over-emphasized. All of the compromises are closely interrelated. In a very real sense, the Plan is the sum of all of its compromises. The fairness and equity of the treatment accorded to any class or member thereof must be evaluated in the context of the Plan as a whole." *In re Penn Central Transp. Co.*, 458 F.Supp. at 1262.

Absent these bargained-for compromises, PCTC (and the other debtors) may well have been forced into liquidation in a process that at the same time would deprive creditors of the value of PCTC's federal income tax loss carry-forwards which by 1975 had reached $1.8 billion. *In re Penn Central Transp. Co.*, 596 F.2d 1127, 1138 (3d Cir. 1979). By having PCC operate within the ambit of the corporate charter and corporate shell of the discharged and reorganized PCTC, these tax loss carry-forwards were saved thereby maximizing the assets available for distribution and making possible the negotiated compromise resolution of all conflicting claims and the prompt closing of the reorganization proceedings.

The restrictive decision below disregards the fundamental congressional purposes of Section 77 reorganization and the need (and power) of the courts to implement final plans built on critical creditor compromises of the kind made in the PCTC reorganization and is without any reasoned support. The appellate court grounded its result upon whether the tort plaintiffs were the holders of "claims" or "interests" which were dischargeable by the applicable Consummation Orders of the Section 77 debtors. In ruling that the Reading and CJI FELA plaintiffs did not have "claims" which were discharged by the terms the Reading and CNJ consummation orders, the court below referred to the language of Section 77(b)(3), but failed to accord meaning to its broad sweep, which includes in the term "claims" all "debts, whether liquidated or unliquidated, securities (other than stock and option warrants to subscribe to stock), liens, or other interests of whatever character." 11 U.S.C. § 205(b)(3). Based on the plain meaning of this expansive language alone, it seems clear that the court below should have found that plaintiffs had an "interest" in the Reading and CJI reorganization. *Gardner v. New Jersey*, 329 U.S. 565, 573, 575-76 (1947). See, 5 Collier on Bankruptcy, § 77.20 at 602-03, (14th ed. 1978).[3] This Court, moreover,

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3 In the context of these tort claims, such a holding would hardly have deprived the plaintiffs below of any recovery. Wholly apart from the plethora of companies which manufactured asbestos or sold products

(Footnote continued on following page)

recently cautioned against giving a limiting meaning to the scope of a dischargeable claim in bankruptcy when Congress has deliberately opted for a broad one. *See, Ohio v. William V. Kovacs, d.b.a. B&W Enterprises, Inc.*, ____ U.S. ____, 105 S.Ct. 705, 708-09 (1985).

Similarly, the Court of Appeals' flawed analysis did not consider the tort claims as "contingent" claims, even though under Section 77(b)(3), claims may include interests which had not yet technically ripened into a legally enforceable right to payment or cause of action against the debtor. *See, e.g., Maynard v. Elliott*, 283 U.S. 273 (1930), *Williams v. United States Fidelity and Guaranty Co.*, 236 U.S. 549 (1915). In this connection, the appellate court purported to distinguish *In re Radio-Keith-Orpheum Corporation*, 106 F.2d 22 (2d Cir. 1939). In that case, landlords who had leased property to one of the debtor's subsidiaries and received a guarantee by the debtor that the rent would be paid, were held to have had those guarantees affected by the debtor's bankruptcy proceedings. Notwithstanding that holding, the Third Circuit reasoned that contingent claimants and holders of "interests" which participate in a reorganization are narrowly confined to those who demonstrate a pre-existing "legal relationship relevant to the purported interest from which that interest may flow." (Pet. App. at 15a-16a). Even were the lower court's decision in this regard otherwise supportable in light of the broad scope of a "claim," it ignores the fact that these plaintiffs had ongoing employer-employee relationships with PCTC, Reading and CNJ for many years before the Northeast railroad reorganizations even began, and that this relationship was within the explicit statutory purview of FELA. And it is out of those relationships that the allegedly unsafe working conditions which are the basis of the present tort claims grew. *See, In re Erie Lackawanna Railway Co.*, Civil No. B 72-2838 (N.D. Ohio June 18, 1985). (Pet. App. at 74a).

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containing asbestos to the railroads, the true successor to the Northeast railroads which were reorganized under Section 77, namely Conrail, still exists as a viable railroad and potential party defendant.

Other authorities on which the court below relied, *Mooney Aircraft Corp. v. Foster (In re Mooney Aircraft, Inc.)*, 730 F.2d 367 (5th Cir. 1984) and *Gladding Corp. v. Forbes (In re Gladding Corp.)*, 20 Bankr. 566 (D. Mass. 1982)), likewise fail to buttress the holding below. In *Gladding* and *Mooney*, the determination of whether the claim was discharged or addressed by the debtors' prior reorganization (in *Mooney*'s case, under Chapter VII of the Bankruptcy Act and in *Gladding*'s case, under Chapter XI of the Bankruptcy Act) was dependent upon whether the claim was "provable" under Section 63(a)(8) of the Bankruptcy Act, 11 U.S.C. § 103(a)(8), which allowed only "contingent debts and contingent contractual liabilities" to be proved and allowed against the estate. In Section 77 reorganizations, on the other hand, the requirement that claims be "provable" under Section 63 of the Bankruptcy Act is, of course, not applicable.[4]

In striking contrast to the decision below, Circuit Judge Robert Krupansky, sitting by designation in the U.S. District Court for the Northern District of Ohio recently held in *In re Erie Lackawanna Railway Company, supra* (Pet. App. at 62a-88a) that the tort claims of former Erie Lackawanna railroad employees based on exposure to asbestos during employment, which were asserted against the reorganized Erie Lackawanna, were absolutely discharged by final orders in the Section 77 proceedings relating to that former railroad carrier. The Circuit Judge in *Erie Lackawanna* carefully analyzed the grounds of the decision of the court below, and concluded, on the basis of the same essential faults in the Third Circuit's reasoning described *supra*, at 16-18, that plaintiffs could not pursue their claims against the reorganized company. The court determined that those plaintiffs failed "to assert their interests which this court qualifies as claims under Section 77 of the

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4 Section 77(b)(2), former 11 U.S.C. § 205(b)(2), expressly provided that the term "creditors" includes "all holders of claims of whatever character against the debtor or its property, *whether or not such claims would otherwise constitute proveable claims under this Act* . . . ." (emphasis added)

Bankruptcy Act, and, therefore, cognizable before consummation of the Plan . . . [and] have lost the opportunity to have those interests evaluated in relation to the many other and competing interests which were asserted during the reorganization." (Pet. App. at 86a).[5] To have concluded otherwise, Judge Krupansky noted, "would have forever destroyed the full faith and credit of the Act by decimating the incentive of certainty and finality upon which debtors, their creditors and security holders of necessity were required to rely and continue to rely under the new Code." (Pet. App. at 68a).

In brief, the Third Circuit fastened on an overly restrictive meaning of the definition of a "claim" under Section 77 when neither the statute, which is intended to foster constitutionally-based federal bankruptcy policies, nor case law, intimates any support for such a constricting approach. The consequences of upholding the appellate court's limiting rule are plain and harsh: complex creditor compromises made in the now consummated reorganizations of the Northeast railroads are undermined; pre-consummation liabilities of the railroad thought to have been disposed of are revived; and expectations upon which investors in the reorganized companies should reasonably rely evanesce. Those are surely not the results Congress intended to flow from the proper exercise of Section 77 bankruptcy powers.

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5 Circuit Judge Krupansky noted, *en passant*, that the Erie Lackawanna Plan, like the PCTC Plan, was the reward of "arduous, exhaustive and comprehensive negotiations and compromises. . . ." (Pet. App. at 63a).

II

THE DECISION BELOW MAY MATERIALLY IMPEDE THE ABILITY OF BANKRUPTCY COURTS TO EFFECT FINAL REORGANIZATIONS UNDER CHAPTER 11 OF THE BANKRUPTCY REFORM ACT OF 1978

The ramifications of the decision below reach beyond having a detrimental impact upon reorganizations already consummated under Section 77. By holding that FELA occupational disease claims manifesting themselves after the consummation of the Section 77 reorganization do not constitute "claims" and cannot be discharged, the Third Circuit's decision may materially impede the completion of the largest and potentially most significant corporate reorganizations taking place under Chapter 11 of the current Bankruptcy Code, 11 U.S.C. § 1101, *et seq.* (1982).[6]

The rising crescendo of asbestos-related toxic tort suits filed has prompted at least three well-known corporate manufacturers of asbestos-related products to file petitions for relief under Chapter 11 of the Code. *In re Johns-Manville Corporation, et al.*, Nos. 82 B 11656-82 B 11676 (Bankr. S.D.N.Y.); *In*

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6 Under Section § 101(4)(A) of the current Code, a "claim" includes a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured . . . ." (emphasis added) Under Section 77(b)(3) of the Act, "claims" include "debts . . . whether liquidated or unliquidated, . . . or other interests of whatever character." Although there is a semantical difference in the definition of "claim" under the old Act and new Code, both definitions are, in all respects pertaining to the issues raised in the Petition, equally broad. Thus, although legislative history does indicate that the definition of "claim" under the new Code was intended to be "even broader . . . than is found in the present debtor rehabilitation chapters," Senate Report No. 95-989, 95th Cong. 2d Sess. at 21-11 (1978), that increased breadth relates mainly to the dispensing of any reliance upon the requirement of "provability" under Section 63 of the old Act (which was explicitly dispensed with in Section 77 reorganizations) and the inclusion in the definition of "claim" under the Code of an equitable right to performance that does not give rise to a "right to payment."

re Amatex Corporation, No. 82-05220K (Bankr. E.D. Pa.); *In re UNR Industries, Inc., et al.*, Nos. 82 B 9841-82 B 9851 (Bankr. N.D. Ill.). Each of these proceedings had as its *raison d'etre* the anticipated flood of asbestos-related personal injury suits which were expected to be filed in the immediate future. The courts dealing with these reorganizations have, therefore, been starkly confronted with the issue of whether a Chapter 11 reorganization can efficaciously be implemented by taking into account and addressing future asbestos-related claims. Although the issue, at this juncture, has turned mainly upon whether a representative or *guardian ad litem* can be appointed for putative asbestos-related claimants on the rationale that such persons can be treated as "parties-in-interest" under Section 1109(b), each court has recognized that the extent to which meaningful Chapter 11 reorganizations can be consummated will, in large part, depend upon whether future asbestos-related claims can be dealt with and discharged in reorganization.

In the absence of a clearly-defined legal rule on dischargeability, the courts considering these pending Chapter 11 reorganizations have taken varying and inconsistent positions. For example, in *In re UNR Industries, Inc.*, 29 Bankr. 741 (N.D. Ill. 1983), *appeal dismissed*, 725 F.2d 1111 (7th Cir. 1984), the district court denied an application for the appointment of a legal representative for such unknown putative asbestos-related claimants. The district court reasoned (as did the court below) that, because those putative claimants do not have a technical cause of action until their asbestos-related diseases have become manifest, there was no claim, contingent or otherwise, which could be discharged and therefore, "[a]ppointing a legal representative to assert claims which are not cognizable under the statute would be fruitless and a waste of the assets of the estate." 29 Bankr. at 746. Yet, the court recognized the basic infirmity of its own holding when it explained that the "putative claimants may wind up with judgments against corporations left with only one asset; a corporate charter." *Id.* at 748. Furthermore, though the Seventh Circuit dismissed the appeal

from the district court's decision on jurisdictional grounds, it expressed serious reservations about the holding. *In re UNR Industries, Inc.*, 725 F.2d 1111, 1119 (7th Cir. 1984).

On the other hand, the Third Circuit in the Amatex proceedings and District Judge Burton R. Lifland presiding over the Johns-Manville Chapter 11 proceedings disagreed with the district court in *UNR*. In *In re Amatex Corporation*, 755 F.2d 1034 (3d Cir. 1985), the Third Circuit determined that putative future claimants could have a representative appointed to represent them, in contrast to the *UNR* district court's apparently clear holding that such persons did not have cognizable "claims" and therefore could not be affected by the debtor's Chapter 11 proceedings. The inconsistency between the Third Circuit's holding in *Amatex*, where the tribunal granted future claimants representation in the debtor's Chapter 11 proceedings, and in *Schweitzer*, where the court held that disposition of such future claims was beyond the power of a bankruptcy court, is manifest.[7] In *In re Johns-Manville Corporation*, 36 Bankr. 743 (Bankr. S.D.N.Y. 1984), *appeal dismissed*, 39 Bankr. 234 (S.D.N.Y. 1984), *appeal permitted*, 45 Bankr. 833 (S.D.N.Y. 1985), Judge Lifland likewise held that, whether or not such putative claimants held dischargeable claims, they did constitute legitimate parties-in-interest within the meaning of Code Section 1109(b). Though he did not adjudicate the specific issue of dischargeability, Judge Lifland recognized that "any plan of reorganization must necessarily

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7 In the same vein, the decision below is also inconsistent with the majority of courts—including the Third Circuit—which have held that mere "exposure" to asbestos may trigger insurance coverage. *See, e.g., Acands, Inc. v. The Aetna Casualty and Surety Company, et al.*, Nos. 83-1927/28 (3d Cir. June 17, 1985); *Insurance Company of North America v. Forty Eight Insulations, Inc.*, 633 F.2d 1212 (6th Cir. 1980), *aff'd on rehearing*, 657 F.2d 814, *cert. denied*, 454 U.S. 1109 (1981); *Keene Corp. v. Insurance Company of North America*, 667 F.2d 1034 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 1007 (1982); *Porter v. American Optical Co.*, 641 F.2d 1128 (5th Cir. 1980), *cert. denied*, 454 U.S. 1109 (1981). *But see, Eagle-Picher Industries v. Liberty Mutual Insurance Co.*, 682 F.2d 12 (1st Cir. 1982), *cert. denied*, 460 U.S. 1028 (1983).

balance the rights and needs of prepetition creditors against the anticipated rights and needs of postpetition creditors with Manville's purportedly limited assets and further economic prospects apportioned accordingly." 36 Bankr. at 749.

The foregoing decisions demonstrate logical inconsistency and show beyond cavil a clear sense of judicial concern about whether and how such putative asbestos claimants can and should be addressed in bankruptcy reorganizations under Chapter 11 of the Bankruptcy Code.[8] Until a uniform rule of law is enunciated, these and other pending Chapter 11 reorganizations may proceed upon fundamentally different legal premises. The decision of the court below, which likely will be relied upon as precedent that such putative asbestos-related claims

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8 The divergent views and approaches of the lower courts with respect to the dischargeability of these asbestos-related claims is perhaps best exemplified by the opinion in *Johns-Manville*. At one point, the court states:

> "[I]t is imperative that such a nationwide standard declare that for purposes of allowability, a claim accrues, measured in some form from the point of discovery or manifestation of a disease in conformity with a great weight of authority favoring this position and the logic contained therein." 36 Bankr. at 751, n.4.

However, in rebuking the decisions of the district court in *UNR* and Judge King (the District Judge whose decision was reversed by the Third Circuit in *Amatex*), the court subsequently seems to argue that such future tort "claims" are, nevertheless, dischargeable in bankruptcy:

> "It is the view of this Court that the declaration by Judges Hart and King that these future claims are nondischargeable in bankruptcy are based on superannuated and considerably narrow notions of what constitutes a claim dischargeable in bankruptcy. These notions are at odds with the expanded definition of "claim" contained in Section 101(4) of the Code.
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> "Accordingly, the *Amatex* and *UNR* Court refusal to declare future claims cognizable in bankruptcy not only ignores the reality of their existence and importance, but also runs contrary to Congress' intention in drafting Code Section 101(4) that all obligations of the debtor should be dealt with in a Chapter 11 case." 36 Bankr. at 754-755, n.6.

cannot be affected by a pending reorganization, may, at the very least, inject substantial new confusion and uncertainty, and, at worst, make a meaningful reorganization of Johns-Manville, Amatex and UNR impossible. Prompt review by this Court would not only rectify an erroneous decision, which fundamentally challenges the underlying legal premises and economic compromises which formed the basis for the Section 77 reorganizations of the Northeast railroads, it also would reconfirm to Bankruptcy Courts the broad scope of their mandate to carry out final reorganizations of corporate debtors.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the Court of Appeals below upon plenary briefing and argument.

Respectfully submitted,

Robert J. Siverd
David A. Bernat
Attorneys for Amicus Curiae
The Penn Central Corporation
500 West Putnam Avenue
Greenwich, Connecticut 06836
Telephone: (203) 629-5314

APPENDIX

STATUTES INVOLVED

Bankruptcy Act of 1898
11 U.S.C. § 11, *et seq.* (repealed)

Section 77(b)(3)
(11 U.S.C. § 205(b)(3))

The term "claims" includes debts, whether liquidated or unliquidated, securities (other than stock and option warrants to subscribe to stock), liens, or other interests of whatever character. . . .

Section 77(f)
(11 U.S.C. § 205(f))

Upon confirmation by the judge, the provisions of the plan and of the order of confirmation shall, subject to the right of judicial review, be binding upon the debtor, all stockholders thereof, including those who have not, as well as those who have, accepted it, and all creditors secured or unsecured, whether or not adversely affected by the plan, and whether or not their claims shall have been filed, and, if filed whether or not approved, including creditors who have not, as well as those who have, accepted it.

* * *

The property dealt with by the plan, when transferred and conveyed to the debtor or to the other corporation or corporations provided for by the plan, or when retained by the debtor pursuant to the plan, shall be free and clear of all claims of the debtor, its stockholders and creditors, and the debtor shall be discharged from its debts and liabilities, except such as may consistently with the provisions of the plan be reserved in the order confirming the plan or directing such transfer and conveyance or retention, and the judge may require the trustee or trustees appointed hereunder, the debtor, any mortgagee, the trustee of any obligation of the debtor, and all other proper

and necessary parties, to make any such transfer or conveyance, and may require the debtor to join in any such transfer or conveyance made by the trustee or trustees. . . .

Bankruptcy Reform Act of 1978
11 U.S.C. § 101, *et seq.*

Section 101(4)
(11 U.S.C. § 101(4))

§ 101. *Definitions.* In this title

* * *

(4) "claim" means—

(A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or

(B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured or unsecured. . . .

Section 1109(b)
(11 U.S.C. § 1109(b))

§ 1109. *Right to be heard.*

* * *

(b) A party in interest, including the debtor, a trustee, a creditors' committee, an equity security holders' committee, a creditor, an equity security holder, or any indenture trustee, may raise and may appear and be heard on any issue in a case under this chapter.